



**In the
United States Court Of Appeals
For the Seventh Circuit**

No. 88-2441
JACK GILPIN, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Defendants-Appellees.

**Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 85 C 3479—Richard Mills, Judge.**

ARGUED JANUARY 17, 1989—DECIDED MAY 24, 1989

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who don't belong to the union. Correlatively, the union is entitled to charge the nonmembers their pro rata share of the expenses that it incurs in negotiating for and administering the collective bargaining agreement, and to ask the employer to deduct this pro rata share from the nonmembers' wages. But if the union goes further and makes the nonmembers pay either the full union dues or an agency fee that exceeds the collective-bargaining costs fairly chargeable to

nonmembers, the union—and the employer—can get into legal trouble. If the collective bargaining agreement is with a *public* employer (state or local) that deducts the union's agency fee from its employees' wages, and part of the fee is used to advance the union's *political or ideological* goals as distinct from defraying the union's expenses of negotiating and administering the collective bargaining agreement, both the public employer and the union can be held liable in a suit under 42 U.S.C. § 1983 for violating the nonmembers' right of free speech under the First Amendment (made applicable to the states by interpretation of the Fourteenth Amendment). See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). What is more, the First Amendment has been held to require the public employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ping v. National Education Ass'n*, 870 F.2d 1369 (7th Cir. 1989).

In September 1985 nine nonunion employees of Illinois state and local agencies brought this suit against the local of the American Federation of State, County, and Municipal Employees that represents those employees in collective bargaining, and against the employers themselves. Several weeks earlier, the union had decided that for the new school year the agency fee (called "fair share fee") would be 90 percent of the union dues, and the union had so notified the employees in the bargaining unit. Shortly after filing the suit the plaintiffs moved for a preliminary injunction to prevent the deduction of the agency fee for the 1985 school year. The motion was denied and the employers proceeded to deduct the fee from the wages of the nonunion employees in the bargaining unit and to pay over the amount deducted to the union, which however placed the entire amount in an interest-bearing escrow account. Although 10,000 of the 20,000 to 30,000 employees in the bargaining unit do not belong to the union, the district judge refused to certify the suit as a

class action.

After the Supreme Court decided *Hudson* in 1986, the district judge held that both the first notice sent by the union to employees regarding the "fair share fee" for the 1985 school year and the procedure that had been used to determine the fee were defective. For the 1986 school year the union sent a new notice after fixing the fee at 96 percent of the union's dues. It also asked the American Arbitration Association to appoint an arbitrator to determine the proper agency fee for both 1985 and 1986, as well as for future years. The arbitrator ruled that in 1985 the proper agency fee would have been 95 percent of union dues, so the nonmembers had gotten a bargain at 90 percent. He ruled that 95 percent was also the proper percentage for 1986, so the union had overcharged nonmembers by 1 percent that year. He directed the union to remit the 1 percent overcharge to the nonmembers from the escrow account together with the interest that had accrued in the account, and the union has agreed to do this. The nonmembers were not required to remit their 5 percent 1985 windfall. The plaintiffs in this suit were not parties to the arbitration proceeding and have not challenged the arbitrator's determinations regarding the proper agency fees for 1985 and 1986.

The district judge was dissatisfied with the 1986 notice but concluded that no harm had been done since the union had agreed to refund the overcharge to all nonmembers, whether or not they had challenged the 1986 agency fee. For the 1987 school year the union prepared a fuller notice, which the judge found adequately informative. The arbitrator has not yet ruled on the propriety of the fee that the union set for 1987 (at 91 percent of union dues), but the union has agreed to abide by whatever ruling the arbitrator makes and to refund any overcharge that he finds to all nonmembers whether or not they challenge the ruling. On the basis of the union's undertakings and the revision of the notice, the judge decided there was no need to order any relief, and he

entered judgment for the defendants.

The plaintiffs appeal, raising four issues that merit discussion: whether the judge should have certified the suit as a class action, given the large number of nonunion employees; whether he should have issued a preliminary injunction against the collection of the 1985 agency fee; whether the plaintiffs are entitled to restitution of the money deducted from their wages in 1985 and 1986, the years for which, the judge found, the union's notices were inadequate; and whether the 1987 notice was inadequate.

The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. See Fed. R. Civ. P. 23(a)(4); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1284 (7th Cir. 1985). Two distinct types of employee [sic] will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee. The Foundation is seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the

"restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees. Nor did it or anyone else propose that the judge certify two classes. Finally, there is little—perhaps no legitimate—need for a class action here. The union's policy is to refund any overcharges determined by the arbitrator to all nonunion members, whether or not they are parties to a judicial or arbitral proceeding; and the nonunion members are not entitled to any additional monetary remedy, as we shall see.

We can be briefer about the second issue. The correctness of the order denying the preliminary injunction is thoroughly moot. The plaintiffs were trying to enjoin the deduction of agency fees for 1985. The judge refused and the fees were deducted. Even the United States Court of Appeals for the Seventh Circuit cannot make time run backwards.

We come to the third issue, restitution. At argument we pressed the plaintiffs' counsel for an explanation of how his clients could have been hurt by the inadequate notices sent in 1985 and 1986. The arbitrator—whose decision the plaintiffs have not challenged—found that the union had undercharged the plaintiffs for 1985, and the union has agreed to refund with interest the slight overcharge that it had exacted in 1986 though never enjoyed, having placed the entire agency fee in escrow. The plaintiffs actually *benefited* from the inadequate notice. The function of the notice is to give employees who don't belong to the union enough information about the agency fee for the forthcoming year to enable them to decide whether to challenge it. Had the plaintiffs received a fuller notice they might have mounted such a challenge.

But a challenge could only have cost them; it could not have benefited them. A challenge to the 1985 fee would have been worse than futile, given the arbitrator's finding that the fee was too low, while a challenge to the 1986 agency fee would have been futile because the arbitrator ordered the tiny overcharge in that fee refunded to all nonunion employees—even those who, like the plaintiffs, did not challenge the fee, whether because the notice was inadequate or for other reasons. The plaintiffs got something for nothing, thanks in part to the defective notices of which they complain.

The plaintiffs remind us that this is a First Amendment case, so that the principle that underlies the previous paragraph—the principle that denials of due process that do no measurable harm give rise to no damages, see, e.g., *Carey v. Piphus*, 435 U.S. 247 (1978)—may not apply. But the principle of *Carey* is not limited to due process cases. As the Supreme Court later explained in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), whatever the constitutional provision that is violated, there can be no award of compensatory damages if there is no harm (i.e., no loss to compensate for). See also *Cygnar v. City of Chicago*, 865 F.2d 827, 848 n. 21 (1989); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 602 (5th Cir. 1988). What is true is that in areas where harm occurs but is not readily monetizable, an award of general damages may be permitted, and taking away a person's right of free speech may be such a case. See, e.g., *Memphis Community School District v. Stachura*, *supra*, 477 U.S. at 310-11; *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558-59 (7th Cir. 1986); *Ustrak v. Fairman*, 781 F.2d 573, 578-79 (7th Cir. 1986); *Parrish v. Johnson*, 800 F.2d 600, 606-07 (6th Cir. 1986). But it is still necessary to show some harm.

We can *imagine* an argument that these plaintiffs suffered harm. In 1986 their employers deducted a larger agency fee than was proper, and although the excess was placed in escrow and not used to fund the union's political

activities, the plaintiffs lost the use of the money, which they might have devoted to the support of political activities of their own choosing. Whether this is a sound argument, cf. *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir. 1988), and what bearing the undercharge in 1985—which freed up funds for the plaintiffs to use on political activities if they chose, and which greatly exceeded the 1986 overcharge—should have on it, we need not consider. The plaintiffs allude to this argument in asking us to reverse the denial of their motion for a preliminary injunction but do not mention it in connection with their claim for monetary relief. Indeed, they do not seek damages. Instead they seek a remedy—restitution—that is ordinarily (although not invariably) a substitute for rather than a form of damages. See, e.g., *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 748 (7th Cir. 1988); Dobbs, *Handbook on the Law of Remedies* 224 (1973) ("The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep"). For example, a copyright holder who has suffered no damages can seek restitution of the infringer's profits in lieu of damages. See 17 U.S.C. § 504; see also 15 U.S.C. § 1117 (trademark infringement). But this avenue (restitution as the remedy for unjust enrichment) is closed to these plaintiffs, not only because the defendants derived no benefit from agency fees deposited in an escrow account but also because those fees did not exceed the union's bona fide expenses on behalf of the plaintiffs and the other nonunion employees. There was no enrichment, and it was not unjust.

The plaintiffs want the entire escrow account paid over to them and the other union nonmembers even though all of the money in it (with the exception of the 1 percent of the 1986 fee that the union has agreed to refund) is necessary—and inadequate—to defray costs properly incurred by the union in representing non-members in

collective bargaining, and even though the union derives no benefit from agency fees held in escrow. It is a severely punitive remedy the plaintiffs seek, not one properly described as restitution at all. It would be suitable if at all only if the defendants had been guilty of willful or malicious violations of the Constitution. Yet the 1985 notice which the district judge found to be defective had been issued before the Supreme Court decided the *Hudson* case, and the 1986 notice was ten pages long and contained voluminous information concerning the agency fee. The only defect the district judge found in the 1986 notice lay in the brevity of the union's description of the procedure for challenging the agency fee. The notice stated: "AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge." The notice gave an address and deadline for mailing a written challenge that "must include the challenge fair share fee payer's ('Challenger's') name, address, social security number, job title, employer and employing agency and location." The district judge thought the notice should contain more details about the arbitration procedure. Maybe so, but this is a matter of judgment and the union can hardly be thought a willful violator of the First Amendment for having guessed differently. Since to file a challenge costs only a postage stamp plus a small amount of time to supply the tiny amount of information that the challenge must set forth, one would not have thought a challenger needed a detailed prospectus of the arbitration procedure before filing.

The 1987 notice contains the following substitute paragraph, approved by the district judge, for the one we quoted from the 1986 notice:

AFSCME Local 200 has established an Arbitration Procedure for resolving challenges to the amount of

the Fair Share Fee. This procedure will result in an expeditious decision on the challenge by an impartial decision maker. The decision maker will be an arbitrator selected by the American Arbitration Association. An arbitration proceeding will be conducted by the arbitrator pursuant to the rules of the American Arbitration Association governing fair share cases. AFSCME will have the burden of proving that the fair share fee is proper. Challengers will have a chance to appear before the arbitrator to state their objections to the fair share fee. The arbitrator will issue a decision regarding challenges to the amount of the fair share fee 30 days after submission of final arguments regarding the amount of the fee. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Is this an improvement? Is it the constitutional *minimum*, as the district court thought? It is more informative, but also longer and more complex. It may invite a few more challenges, but so what? The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure.

The issue is not whether the provision regarding challenges in the 1986 notice was constitutionally inadequate—an issue no party has raised—but whether its inadequacy was so patent that the union should be punished by being deprived of millions of dollars (\$6 million to be precise) to which it is otherwise lawfully entitled. We think not. The constitutional violation was a technical one at worst, and a punitive remedy is not

called for. What the plaintiffs call restitution we call punitive damages, and the Supreme Court has set forth standards for the award of punitive damages in civil rights cases that the plaintiffs have not attempted to satisfy. See *Smith v. Wade*, 461 U.S. 30 (1983); *Soderbeck v. Burnett County*, 752 F.2d 285, 289-91 (1985); *Walsh v. Mellas*, 837 F.2d 789, 801-02 (7th Cir. 1988); *Erwin v. County of Manitowoc*, Nos. 88-1211, 88-1263, slip op. at 13 (7th Cir. April 19, 1989).

Indeed, if we ordered the union to turn over the escrow account to the plaintiffs and the other nonunion employees, the union would have a strong claim for restitution. For the union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things that exceeded the amount in the escrow account for 1985 and 1986. The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them. See, e.g., *Goldstick v. ICM Realty*, 788 F.2d 456, 467 (7th Cir. 1986); Palmer, *The Law of Restitution* §§ 1.2, 4 (1978 and Supp. I 1984); Dobbs, *supra*, at 232-35. In claiming restitution the plaintiffs are standing that remedy on its head. This is further proof that they are seeking punitive damages by another name without having satisfied the conditions for an award of punitive damages in a civil rights case.

The last issue is whether the 1987 notice provided sufficient information regarding not the procedures for challenging the agency fee but the allocation of union expenses between agency and other accounts. The plain-

tiffs complain that the breakdown is not detailed enough to enable them to determine whether a challenge to the agency fee is likely to succeed. Yet the notice breaks down the union's activities into 35 categories and indicates which ones the union considers activities wholly in support of its agency mission (e.g., adjusting grievances under the collective bargaining agreement), which it considers wholly unrelated to that mission (e.g., contributing to political campaigns), and which it considers a mixture of agency and other functions (e.g., publishing a union newsletter). The notice recites that the arbitrator has found that the union's allocation of expenses in accordance with this breakdown is proper, and offers a copy of his detailed ruling for \$1.50. The notice contains another list of 35 items—not the 35 separate activities that the union engages in but the 35 different types of expenditures listed in its audited financial statement (salaries and benefits, depreciation, telephone, etc.)—and indicates what percentage of each is chargeable to union nonmembers as part of the agency fee.

The plaintiffs complain that despite its detail the notice does not explain the principles under which, say \$16,788 out of a total of \$17,445 for "Editorial Services" is chargeable to the agency fee portion of union dues. But if it did, the notice would be as long and complicated as an SEC prospectus. The notice indicates which activities the union considers to be wholly or partly in pursuit of its agency mission, and what percentage of each expenditure item is allocated to that mission. This should be enough information (in contrast to the notice held deficient in *Damiano v. Marsh*, 830 F.2d 1363 (6th Cir. 1987)) to allow the employee to decide whether there is any reason to mount a challenge. Cf. *Chicago Teachers Union v. Hudson*, *supra* 475 U.S. at 306-07. Since mounting a challenge is for all practical intents and purposes free and since only one challenger is necessary to obtain a refund for all nonunion employees, we cannot see the point in requiring the union to provide even more information than the district judge required. In objecting to the notice, the

plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union.

The appeal is dismissed insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction. Otherwise the judgment is affirmed. Costs in this court to the defendants.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

**Jack GILPIN, et al., Plaintiffs,
v.
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, et al., Defendants.**

No. 85-3479.

United States District Court,
C.D. Illinois,
Springfield Division.

July 30, 1986.

ORDER

MILLS, District Judge:

The parties offer cross motions for summary judgment. Fed.R.Civ.P. 56. The Court finds that liability rests with the Defendants who have denied the Plaintiffs their rights to procedural due process in violation of 42 U.S.C. § 1983. Jurisdiction is appropriately premised on 28 U.S.C. § 1331.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party against whom summary judgment is entered and give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cross motions for summary judgment require no less careful scrutiny of the factual allegations. *LaCourte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir.1983). The Court's inquiry "unavoidably asks whether

reasonable jurors could find by a preponderance of the evidence that the Plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986), (*quoting Improvement Co. v. Munson*, 14 Wall. 442, 448, 81 U.S. 442, 448, 81 U.S. 442, 20 L.Ed. 867 (1872) (emphasis in original).

The posture of this particular litigation facilitates adherence to these guidelines. The parties have hammered out an understanding of the facts by dint of hard labor.

The Plaintiffs are employees of the State of Illinois, specifically the Department of Public Aid. The employees of the Department of Public Aid are divided into at least two bargaining units for the purpose of administering a collective bargaining agreement entered into between the State of Illinois and Defendant American Federation of State, County, and Municipal Employees (AFSCME). Although none of the Plaintiffs are members of Defendant AFSCME, they have been assigned to one of two bargaining units: RC-62 or RC-63. As of August 30, 1985, there were 12,289 state employees assigned to these two bargaining units and approximately half of these employees were not members of Defendant AFSCME.

On February 10, 1984, Defendant AFSCME entered into an agreement with the Illinois Department of Central Management Services (CMS), an agency of the state that has statutory authority to negotiate and administer collective bargaining agreements. The February 10th agreement provided for the assessment and collection of

"fair share" contributions from state employees who were not members of AFSCME.¹

"Fair share" assessments are fees deducted from the paychecks of non-union employees and paid to the union as a pro rata assessment of the costs of conducting collective bargaining activities from which the non-union employees necessarily benefit. The parties do not contest the constitutionality of "fair share" assessments, rather the Plaintiffs object to the procedure whereby the fees were collected.

After entering into the "fair share" agreement, CMS notified various state department managers by letter of the impending "fair share" assessments in late April and again in early July 1984. By August 30, 1985, a majority of the employees in bargaining units RC-62 and RC-63 became members of Defendant AFSCME. Thereupon Defendant AFSCME notified CMS of its intention to seek "fair share" deductions from all employees who were not members of

¹The relevant portion of the agreement provides:

Pursuant to Section 3(g) of the Illinois Public Labor Relations Act effective July 1, 1984, the parties agree that in bargaining units [sic] in which AFSCME has or attains majority union membership, or receives a majority decision by referendum as set forth below, subsequent to July 1, 1984, the following shall be applicable: Employees covered by this agreement who are not members of the Union or do not make application for membership within fifteen (15) days of employment, shall be required to pay, in lieu of dues, their proportionate share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment, but not to exceed the amount of dues uniformly required of members. The proportionate share payment, as certified by the Union pursuant to Section 6(e) of the Illinois Public Labor Relations Act, shall be deducted by the Comptroller from the earnings of the non-member employees and shall be remitted semi-monthly to the Union.

the union. Pursuant to the agreement entered into between AFSCME and CMS, AFSCME certified the "fair share" contribution to be 90% of regular union dues.

On September 6, 1985, CMS informed the various state agencies that deductions for "fair share" contributions would begin with the September 16 through 30 pay period. Between September 10 and September 30, 1985, members of Defendant AFSCME placed notices of the impending "fair share" assessments on bulletin boards throughout the state offices. (Exhibits affixed to Defendant AFSCME's reply to Plaintiffs' motion for a preliminary injunction.) The notices indicated that the "fair share" assessment would be "90% of local union dues paid by AFSCME members." They gave a brief explanation of the manner in which the percentage was determined. And they stated that the deductions would begin with the September 30, 1985, pay period. Both notices provided the following information regarding objections to and appeals from the "fair share" assessments:

Non-members have the right to object to the amount of the "fair share" fee and may do so (1) through AFSCME's internal procedure; or (2) by filing an unfair labor practice charge with the Illinois Public Employee Labor Relations Board, 320 West Washington St., Suite 500, Springfield, Illinois;

For further information:
write: AFSCME Council 31, Attention Jackie Kinnamen, 201 North Wells St., # 1850, Chicago, Illinois 60606.

This suit was filed on September 27, 1986. The first pay period during which "fair share" assessments were deducted ended on September 30, 1986. Two days later, CMS sent a letter to all affected employees signed by Bureau of Personnel Manager Robert H. Tapscott which in substance tracked the notices posted by Defendant AFSCME. (Plaintiff's Exhibit 6). With respect to the opportunity to object and appeal the CMS letter provided:

You have a right to challenge the amount of the fair share assessment levied by the union. You can obtain more information about how to challenge the assessment amount by writing: AFSCME, Attention Jackie Kinnamen, 201 North Wells St., Suite 1850, Chicago, Illinois 60606 . . . Should you have any further questions, you may contact the Bureau of Personnel, Division of Employee and Labor Relations, at (217) 782-8164.

The day following the appearance of the CMS letter, 31 non-union employees filed complaints with the Illinois State Labor Relations Board (SLRB).² One week later, the first paychecks subject to the "fair share" deductions were issued.

At the time the "fair share" deductions were assessed and the notices were promulgated, the Illinois State Labor Relations Board (SLRB) had established no specific rules or regulations for considering objections to the assessments. On October 22, 1985, the SLRB directed its counsel to draft such rules and regulations and to report back by November 20, 1985. On November 20, the SLRB assumed jurisdiction over the complaints lodged against the "fair share" assessments. Five days later, AFSCME established an escrow account for the "fair share" assessments paid by all non-union employees whose objections to the assessments were known to AFSCME. The SLRB issued a complaint on the consolidated charges on December 3, 1985. A hearing on that complaint has been postponed several times at the request of the complainants.

Although the objection and appeal procedure advertised in AFSCME's posted notices was, in fact, not yet available, Defendant AFSCME did have in place an internal union grievance procedure. Under this procedure,

²The Court is informed that subsequent to the filing of this cause additional employees have filed complaints with the SLRB.

an objecting, non-union employee may file a written challenge with the union to be reviewed by the Executive Board of AFSCME Council 31. An objector may appeal the Executive Board's decision to a professional arbitrator chosen and compensated by agreement of the union *and* the objector. As a second internal union remedy, a non-union employee may file a challenge directly with the union local's International affiliate and obtain a hearing from a designated hearing officer. The record does not indicate the existence of, or the nature of, any appeal or review of the decision by the International's hearing officer.

Law

The Plaintiffs contend that this cause of action is controlled by the Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, ___U.S.___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The Defendants respond (1) that this Court should observe the doctrine of abstension [sic]; (2) that they have afforded the Plaintiffs all the procedure due; (3) that any procedural defects have been or are being cured and thus mooted; and (4) that the procedural guidelines outlined in *Hudson* should only be applied prospectively. After a review of the materials submitted for consideration, the Court finds that the *Hudson* decision does control the resolution of this cause, that the procedure outlined therein was violated by the Defendants, and that a remedy should be fashioned.

The equitable doctrine whereby a federal court abstains from considering a complaint pending resolution of the same or similar claims by a state tribunal is applicable where the complainant has the option of choosing between a federal or state forum and where the resolution of unsettled questions of state law will end the controversy. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); see also *Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Defendant AFSCME

apparently contends that if this Court were to abstain and thereby allow sufficient time for correction of any procedural flaws, the Plaintiff's cause of action would thereby be mooted. Such an abstention [sic] would not, however, vindicate those constitutional rights Plaintiffs were and continue to have been denied. See *Hudson*, 106 S.Ct. at 1075 n. 14.

The parties do not dispute that the deduction of "fair share" fees impinges on recognized liberty and property interests to which the strictures of the Fourteenth Amendment's due process clause apply. The parties' dispute lies in determining the precise nature of the procedures that are due. However, this dispute has been effectively resolved by the United States Supreme Court:

We hold today that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson at 1078. The procedure which Defendant AFSCME instituted in the fall of 1985 fails both the notice and appeal criteria outlined by the Supreme Court.

I. The "notices" published by the Defendants fail the test of adequacy in three respects.

First, the notice must inform all interested parties of the rationale behind the calculation of the "fair share." "The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Hudson* at 1076 n. 18 (Relatively large expenditures, the Supreme Court indicates, should be divided into their component parts so as to demonstrate

with specificity the nature of the expenditure). The notices to which the Plaintiffs object merely indicated the union's conclusion as to the appropriate percentage of its budget expended on negotiation and failed to give detailed figures verified by an independent audit.

The second inadequacy in the notice Defendants provided Plaintiffs lies in the failure to provide sufficiently specific information on the procedure for lodging an objection to the "fair share" assessment. The notices posted by Defendant AFSCME did inform potential objectors that two avenues of redress existed and provided addresses for the SLRB and AFSCME Council 31. The notices did not contain phone numbers for the respective offices and, more importantly, they did not explain the procedure for making an objection known. The Supreme Court has indicated that "the non-members 'burden' is simply the obligation to make his objections known." *Hudson* at 1076 n. 16. The notices posted by the Defendants, by their lack of information regarding the procedure for objection, imposed upon the Plaintiffs not only the burden of objecting but also the burden of discovering how to object. Adequate notice entails information sufficient for an individual, unsophisticated non-union employee to file a written objection without further investigation.

Adequate notice also implies timely notice. Although the timing of the notice provided to the Plaintiffs in *Hudson* was not at issue before the Supreme Court, this Court finds that adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a *fait accompli*. In the present situation, although Defendant AFSCME notified the Department of Central Management Services of its intention to collect "fair share" assessments on August 30, 1985, neither the union nor the state made any attempt to notify the Defendants until September 10, 1985 (at the earliest), five days prior to the commencement of the first pay period during which "fair share" fees were to be

assessed. Without establishing an arbitrary period of time, the Court finds that the period of time necessary to establish the mechanics for deduction of the "fair share" fees is adequate for providing notice to any potential objectors. Once the union informs management of its desire to assess "fair share" fees in a specified amount, those against whom the fees will be assessed should also be notified of their right to object.

II. In addition to notice of their right to object, employees subject to "fair share" assessments are also entitled to "a reasonably prompt decision by an impartial decisionmaker." *Hudson* at 1076. The notices posted by the Defendants and the additional information available to objectors who write the union indicate three alternative avenues of appeal. An objecting non-union employee may file a charge with the State Labor Relations Board, or he may file an objection with AFSCME Council 31, or he may file an objection with the AFSCME International. *Hudson* requires only that the available procedure afford an objector "to have his objections addressed in an expeditious, fair, and objective manner." *Hudson* at 1076; see also *Id.* at 1076 n. 19.

None of the procedures available to the Plaintiffs here satisfy the minimum requirements of *Hudson*. The mechanism for mounting a challenge through the State Labor Relations Board, while potentially adequate, was essentially non-existent at the time the Defendants began deducting "fair share" fees. The appeal process through the AFSCME International fails for its use of hearing officers employed and therefore controlled by the union. *Hudson* at 1077. The appeal process through the union local has the distinct advantage of permitting both the objector and the union to select a mutually agreed upon arbitrator; however, an objector obtains arbitration of his claim only after review of his complaint by the local's Executive Board and thus falls short of the expeditious, fair and objective standard. None of the opposed methods of appeal provide "a reasonably prompt opportunity to

challenge the amount of the fee before an impartial decisionmaker." *Hudson* at 1078.

III. The union does appear to have satisfied the third major requirement of a valid "fair share" fee system by having established "an escrow account for the amounts reasonably in dispute while such challenges are pending." *Id.* at 1078. However, the *ex post* establishment of an escrow does not cure the procedural defects with respect to notice and appeal.

Contrary to the Defendants contentions, the Court finds that the constitutional strictures against which the Defendants' procedures have been measured were sufficiently established at the time the Defendants implemented their "fair share" assessments to require Defendants to adhere to them. The 7th Circuit's opinion in *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir.1984), had been handed down prior to the implementation of the "fair share" deductions challenged here. While much of the Seventh Circuit's opinion was advisory in nature, it did provide some guidance which the Defendants chose to abjure. Moreover, in *Hudson*, the Supreme Court specifically directed that the district court retroactively fashion a remedy in accordance with its elucidation of the procedures that were due.³

³While the Court finds that the procedural requirements for the deduction of "fair share" fees were sufficiently established to justify retroactive application of the remedy to be fashioned, the Court's finding should not be construed as a determination that the legal standards were so clear as to justify the assessment of damages against the state officers who are Defendants here. The Court has previously ruled that the law with respect to "fair share" deductions was not so clear as to pierce the special immunity afforded our public decision-makers.

Remedy

Having found that the Plaintiffs rights were, indeed, violated, the Court now, of necessity, considers the question of an appropriate remedy. In fashioning the appropriate remedy, the Court turns to those officers who have thus far served the Court well during the pendency of this cause. The remedy shall include injunctive relief as well as damages and fees to the extent warranted. Its details should, in the first instance, be proposed by the parties who, in the nature of things, best understand the practical considerations of implementation. Its scope should be sufficiently broad to provide for all those who have been subject to procedures which essentially, if not intentionally, were unfair.

To this end, the Plaintiffs are directed to file a memorandum with a proposed remedy and Defendants shall respond. The Court will then convene a hearing to be attended by all parties—at which the precise details of the remedy will be determined.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
)	
Plaintiffs,	)	FILED
	)	JUN 29 1987
v.	)	JOHN M. WATERS,
	)	Clerk
	)	U.S. DISTRICT
AMERICAN FEDERATION	)	COURT
OF STATE, COUNTY AND	)	CENTRAL DISTRICT
MUNICIPAL EMPLOYEES,	)	OF ILLINOIS
et al.,)	
)	
Defendants.)	

ORDER

MILLS, District Judge:

The American Federation of State, County and Municipal Employees (AFSCME) has moved to reconsider the Court's order of June 30, 1986, holding in favor of Plaintiffs and against the Defendants on the issue of their liability under 42 U.S.C. §1983. Pursuant to that order, the parties have submitted proposals concerning the appropriate remedy. In addition, updating briefs have recently been filed concerning AFSCME's attempted compliance with the June 30 order and the dictates of *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986). We now: (1) deny AFSCME's motion to reconsider; and (2) direct AFSCME to submit an amended draft of the proposed notice to all fair share fee payors.

The facts of this case are not disputed and are summarized in the Court's previous order. In that order,

we concluded that AFSCME's procedure for entertaining objections to the union's collection of the "fair share" fee prior to *Hudson* was defective because: (1) it did not adequately notify the payors of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, at p. 2.

AFSCME's motion to reconsider is premised upon the issue of mootness: it contends that after the *Hudson* decision, AFSCME voluntarily and fully implemented a system of procedures consistent with that case. It also maintains that the named plaintiffs have not suffered monetary damage as a result of any previous constitutional violation, thus mootting this case *in toto*. To buttress its conclusion, AFSCME has submitted memoranda outlining the steps it has taken to comply with our order and *Hudson*, as well as a nine-page document entitled "Notice to All Nonmember Fair Share Fee Payors" which it submits, satisfies the *Hudson* dictates for notice.

Plaintiffs' response points to a number of deficiencies in what they term "AFSCME's new and improved" procedures. Their primary objections, however, focus solely on the *Hudson* notice requirement. They no longer dispute that the AFSCME appeals process in fact affords prompt review before an impartial decisionmaker; Plaintiffs also concede that the *timing* of the notice provides the payors with enough time to object. Still, they claim that the substance of the notice provided does not give fair share fee payors enough information to knowingly take advantage of those procedures.

Although AFSCME appears to have undertaken a good faith effort to bring its procedures in line with *Hudson*, the notice given to fair share payors continues to fall short of the constitutional minimum. This order will therefore direct AFSCME to submit an amended draft of its proposed notice. In particular, the Court finds that

Plaintiffs' arguments with respect to notice of the procedures that will be followed *after an employee lodges his or her challenge* are well taken.

Currently, AFSCME's notice of the procedure for lodging a challenge states:

AFSCME LOCAL 2000 PROCEDURE FOR
CHALLENGING THE AMOUNT
OF THE FAIR SHARE FEE

AFSCME Local 2000 has established the following procedures for individual fair share payors who wish to challenge the foregoing calculation and the amount of the AFSCME fair share fee. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO CHALLENGING [sic] THE AFSCME LOCAL 2000 FAIR SHARE FEE.

Challenges

Fair share fee payers must inform AFSCME Local 2000 of their challenge to the amount of the fair share fee in writing by mail. The written challenge must include the challenge fair share fee payer's ("Challenger's") name, address, social security number, job title, employer and employing agency and work location.

The written challenge must be received by AFSCME Local 2000 at the following address and post-marked no later than May 31, 1986.

AFSCME Local 2000
343 South Dearborn, Suite 1709
Chicago, Illinois 60604

B. AFSCME Local 2000 Arbitration Procedure

AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Although this notice gives an employee enough information to *start* the procedure, it does not explain the process once the initial challenge is lodged. As this tribunal interprets *Hudson*, more detailed notice of the arbitration procedure itself is necessary to provide the nonunion employee with the information he needs to decide whether or not to object, and "to [thus] minimize the risk that nonunion employee contributions might be used for impermissible purposes . . ." *Hudson*, 106 S. Ct. at 1077. Similar to the disclosure of financial figures, leaving the nonunion employee completely in the dark about the arbitration procedure—and requiring them to object in order to receive information—does not adequately educate the employees about their procedural options. For example, proper notice should at least state that arbitration will ensue in accordance with the rules of the American Arbitration Association and that a copy of such rules are available well in advance of the deadline for filing an objection. This kind of notice entails a minimum of expense to the union, and decreases the risk that a nonunion employee would unknowingly bypass his right to object.

We therefore direct the Defendants to submit a further draft of the "procedural notice" section of its notice.

Plaintiffs also challenge the adequacy of the list of AFSCME expenditures contained in the notice. In *Hudson*, the Court held that the First Amendment demands that "potential objectors be given sufficient information to gauge the propriety of the union's fee." 106 S. Ct. at 1076. Plaintiffs maintain that AFSCME's list is defective because 35 types of AFSCME activities are grouped separately, and because there is no one-to-one relationship between those 35 activities and the list of expenses that follow. With this conclusion, the Court cannot agree.

Hudson itself noted that practical considerations render it impossible to expect "absolute precision" in the calculation of the charge to nonmembers:

The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as a verification by an independent auditor.

106 S. Ct. at 1076 n. 18.

Despite Plaintiffs' protests, AFSCME's notice meets these essential requirements. It first sets forth two separate lists of expenditures, one for the national union, and one for AFSCME Local 2000. Next, the notice states the amount of expenditure in each category considered chargeable to nonmembers in calculating the amount of the fee. It then details those activities which are funded with the use of fair share fees and those which are not. Finally, each of the categories of expenses are verified by an independent auditor. We conclude that this information satisfactorily outlines the major categories of expenses charged to nonunion employees, and provides a sufficient basis for the employee to determine whether to mount a challenge to the fair share assessment.

Nevertheless, because AFSCME's "procedural notice" remains inadequate, this case is not yet moot. *Ergo*, the motion to reconsider is DENIED. AFSCME is ordered to submit a proposed amendment to its notice within 30 days. Moreover, as a necessary consequence of our holding that the procedural notice remains defective, previously non-objecting employees must be afforded another opportunity to object to the deduction of their share.

ENTER: June 29, 1987.

FOR THE COURT:

Richard Mills
RICHARD MILLS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
)	
Plaintiffs,	)	FILED
	)	JUN 14 1988
v.	)	JOHN M. WATERS,
	)	Clerk
AMERICAN FEDERATION	)	U.S. DISTRICT
OF STATE, COUNTY, AND	)	COURT
MUNICIPAL EMPLOYEES,	)	CENTRAL DISTRICT
AFL-CIO, et al.,	)	OF ILLINOIS
)	
Defendants.)	

ORDER

MILLS, District Judge:

This case is before the Court following the issuance of a rule to show cause why this action should not be dismissed and a final judgment entered.

This rule followed two orders in which the Court held that AFSCME's procedure for entertaining objections to the union's collection of "fair share" fees was defective under the dictates of *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986).

The first order issued following the filing of cross motions for summary judgment. We ruled in favor of Plaintiffs and against Defendants and ordered both parties to fashion a remedy. Part of Defendants' submission on the remedy phase was a "motion to reconsider" the order granting Plaintiffs' motion for summary judgment.

The basis for granting Plaintiffs' initial motion was our finding that the notice to fair share fee payers was defective because: (1) it did not adequately notify the payers of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, p. 2.

AFSCME's "motion to reconsider" included a memorandum outlining their compliance with our order and the dictates of *Hudson*.

We found that the new notice provision was still defective with respect to the notice of the procedures that will be followed after an employee lodges his or her challenges. In all other respects, we held that the new notice complied with *Hudson* and the order of this Court. We ordered AFSCME to submit a proposed amendment to its notice in thirty days.

After receipt of the proposed amendment, we held that the new proposal fully complied with *Hudson* and the order of this Court. We also agreed with AFSCME's contention that Plaintiffs had not been prejudiced by the defect in the initial notice because AFSCME placed 100% of the fees collected to date in an interest bearing escrow account. Therefore, AFSCME never had use of the fees collected from Plaintiffs.

We have not changed our position regarding those conclusions made in the August 6, 1987, order. However, we do find that further comment is necessary to clarify the procedural posture of this case.

The confusion seems to have begun following the granting of Plaintiffs' motion for summary judgment. At that time, we ordered the parties to submit an appropriate remedy.

AFSCME did not submit a "proposed remedy", but instead filed the motion to reconsider referred to above. Technically, the motion to reconsider was improperly labeled as such.

First, there is no such creature as a "motion to reconsider" under the federal rules. Post-judgment relief is limited to situations discussed by Rules 59 and 60. *F/H Industries, Inc. v. National Union Fire Ins. Co.*, 116 F.R.D. 224, 225 (N.D. Ill. 1987). Second, the proposed notice which was subject to the June 29, 1987, order was submitted in response to an order of this Court that a remedy be fashioned by the parties. We construed AFSCME's motion to reconsider as being a response to our order to submit a remedy.

Hence, Plaintiffs' suggestion that the new notice is not properly before the Court is incorrect. It was before the Court prior to the June 29 order and once again before the Court prior to the August 6 order.

Nevertheless, whether labeled as a motion to reconsider or a proposed remedy, two questions were before the Court: (1) Did the new procedural notice comply with the *Hudson* guidelines? (2) Were Plaintiffs entitled to damages as a result of the previous defective notices?

Upon the proposal before the Court on the June 29 order, we answered the first question in the negative and therefore did not reach the issue of damages. As to the first question, we did note that AFSCME had cured a portion of the defective notice but that it was still defective in one aspect—procedures to be followed after the employee lodges the challenge.

However, upon review of the new proposal filed thirty days after the June 29 order, we found that "[AFSCME] has fully complied with this Court's interpretation of the

procedures mandated by *Chicago Teachers Union v. Hudson*. Order of August 6, 1987, at p. 1.

We also held that Plaintiffs were not prejudiced by the defects in the initial notices because the fees collected to date had been held in a interest bearing escrow account. This is consistent with our holdings throughout the case. We *never* held that the procedure was defective with regard to the establishment of the escrow.

This in turn decides the issue of damages. Plaintiffs cannot be entitled to any rebate of their fees if AFSCME has never had the use of those fees.

Plaintiffs also argue that the pendency of a class certification motion prevents the Court from entering judgment on this case. We disagree. The pendency of the class certification motion does not keep this case alive. First of all, this is not the first time a class certification motion has been pending before the Court in this case. We initially denied the request to certify a class at a hearing held on October 18, 1985. We stated our reasons on the record. We, however, stated that we would not preclude a renewed motion for class certification sometime later in the litigation. Nevertheless, we are in essential agreement with the reasoning stated in our prior denial.

Second, even in the event that the Court has changed its position, any renewal of the motion is most likely untimely filed. Because injunctive relief is no longer at issue, certification at this stage would have to contemplate the certification of a b(3) class. And a b(3) class cannot be certified once a case has been decided on the merits. *Hudson v. Chicago Teachers Union Local No. 1*, 117 F.R.D. 413, 415 (N.D. Ill. 1987), *on remand*, 106 S. Ct. 1066 (1986). Thus, for these reasons, we deny the motion to certify the class.

Finally, we agree with the Defendants' conclusion that the case is now moot. Of course, we recognize that

"voluntary cessation of illegal activity does not moot a case." *Hudson*, 106 S. Ct. at 1075 n. 14.

However, the cessation of illegal activity in this case was hardly voluntary. Rather, it was done at the insistence of this Court. Hence, any recurring violation would be done at the risk of invoking the contempt power of this Court.

Ergo, we find that this case is DISMISSED as moot. Judgment entered for Defendants.¹

Case CLOSED.

ENTER: June 13, 1988

FOR THE COURT:

Richard Mills
RICHARD MILLS
United States District Judge

¹Although we entered judgment for Defendants at this point, based on mootness, we do not find that this is dispositive of the issue of who is a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988. This must wait for another day.

JUDGMENT - ORAL ARGUMENT
United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 24, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

JACK GILPIN, et al.,)	
Plaintiffs-Appellants,	)	Appeal from the United
	)	States District Court for
	)	the Central District of
No. 88-2441	vs.	) Illinois, Springfield
		) Division.
AMERICAN FEDERATION)	
OF STATE, COUNTY, and)	
MUNICIPAL EMPLOYEES,	)	No. 85-C-3479
AFL-CIO, et al.,	)	RICHARD MILLS, Judge
Defendants-Appellees.)	

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, DISMISSED IN PART, with costs in this court to the defendants, in accordance with the opinion of this Court filed this date.